

Mistry (Migration) [2022] AATA 1944 (16 June 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Pinna Bhanu Mistry
CASE NUMBER:	1815932
HOME AFFAIRS REFERENCE(S):	CLF2018/48582
MEMBER:	M. Edgoose
DATE:	16 June 2022
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl 801.221 of Schedule 2 to the Regulations

Statement made on 16 June 2022 at 9:02am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing relationship – validly married – relationship statements provided – financial, household and social aspects of relationship and nature of commitment – three children and extensive period of living as family unit – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2)(a)-(d), 65

Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cl 801.221(2)(c)

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 23 May 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 26 May 2014 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 801.221 because the delegate was not satisfied that the applicant and sponsor were in a genuine and continuing relationship.
4. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

Whether the parties are in a spouse or de facto relationship

5. Relevantly to this matter, cl 801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
6. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

7. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal has before it a copy of a valid certificate of matter that was submitted to the Department at time of the visa application. The certificate of marriage stated that the applicant and sponsor were married on 11 January 2014 at the Registry of Civil Marriages, Old Treasury Building, Spring Street, Melbourne Victoria. On the

evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

8. The Tribunal has given careful regard to all circumstances of the relationship in accordance with reg 1.15A(3). The Tribunal is satisfied with the evidence before it that the couple meets the requirements of the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of persons' commitment to each other.
9. The couple each provided a relationship statement to the Tribunal in early 2022 which detailed their relationship history, that they have had three children together and that the sponsor pays for all of the bills including rent, utility bills and food from his own salary. The couple have also submitted old and current lease agreements in joint names, a range of rental receipts and the birth certificates for each of their three children. Given this evidence the Tribunal is satisfied that the couple are in a genuine relationship and place significant weight on the fact that the couple have had three children together and have lived together as a family unit for an extensive period of time to the exclusion to all others.
10. Given these findings the Tribunal is satisfied that the requirements of s 5F(2) are met at the time of this decision. Therefore, the applicant meets cl 801.221(2)(c).
11. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

12. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl 801.221 of Schedule 2 to the Regulations.

M. Edgoose
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).